

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ORLANDO CRESWELL,

No. C-12-6219 TEH (PR)

Petitioner,

v.

ORDER DENYING PETITION FOR WRIT  
OF HABEAS CORPUS; DENYING  
CERTIFICATE OF APPEALABILITY

P.D. BRAZELTON, Warden,

Respondent.

\_\_\_\_\_ /

Orlando Creswell, a California prisoner, has filed this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging a judgment of conviction from Santa Clara County Superior Court. Respondent was ordered to show cause why the petition should not be granted. Respondent has filed an answer, and Petitioner has filed a traverse. For the reasons set forth below, the petition is DENIED.

I

On October 30, 2009, Petitioner and his codefendant Raul Mata were convicted by a jury of multiple offenses related to several violent robberies they committed. Docket No. 18, Ex. A

1 ("CT") at 197-200, 202-03 and 274-75. With the addition of  
2 recidivist enhancements, Petitioner was sentenced to a term of 50  
3 years to life with a consecutive sentence of 31 years. CT at 274-  
4 75. Petitioner's sentence was based on his admission on cross-  
5 examination that he had sustained the priors. However, the question  
6 of whether Petitioner suffered the prior convictions was not tried  
7 by the jury, and Petitioner did not object to the discharge of the  
8 jury.

9           Petitioner appealed his conviction in October 2010,  
10 arguing that his conviction should be reversed for the following  
11 reasons: erroneous denial of request for substitution of counsel;  
12 prosecutorial misconduct; ineffective assistance of trial counsel;  
13 and cumulative error. He also argued that his sentence should be  
14 set aside because the prior conviction allegations had not been  
15 proven true. Docket No. 18, Ex. C. Petitioner was also  
16 simultaneously seeking habeas relief. On April 25, 2011, as his  
17 appeal was pending, Petitioner filed a petition for review in the  
18 state appellate court seeking reversal of his conviction on the  
19 following grounds: ineffective assistance of trial counsel for  
20 failure to consult an eyewitness identification expert and failure  
21 to object to prosecutorial misconduct; Petitioner was entitled to  
22 substitution of counsel; ineffective assistance of appellate counsel  
23 through the court's denial of Petitioner's application for ancillary  
24 funds; and cumulative error. Docket No. 18, Ex. F.

25           The appellate court addressed both the appeal and the  
26 habeas petition in a reasoned opinion on August 19, 2011. The  
27 appellate court upheld the conviction but remanded the case for a  
28

1 court trial on his prior convictions and for resentencing. People  
2 v. Mata, et al., No. H035445, 2011 WL 3652528, (Cal. Ct. App. Aug.  
3 19, 2011), as modified on denial of reh'g (Sept. 16, 2011). The  
4 appellate court found that Petitioner had waived his right to a jury  
5 trial on the truth of his prior conviction allegations when he  
6 failed to object to the jury discharge but that he was entitled to a  
7 court trial on the prior conviction allegations. Mata, 2011 WL  
8 3652528, at \*12-\*13. On September 27, 2011, Petitioner filed a  
9 petition for review in the California Supreme Court, raising the  
10 same arguments raised in his appeal. Docket No. 18, Ex. I. The  
11 petition for review was denied on November 16, 2011. Docket No. 18,  
12 Ex. J.

13 On March 16, 2012, the trial court held a court trial on  
14 Petitioner's prior convictions and found that the prior convictions  
15 were proven beyond a reasonable doubt and imposed the same sentence  
16 as before. Docket No. 18, Ex. L at 5-22. Petitioner appealed this  
17 finding on July 6, 2012, arguing that the sentence should be vacated  
18 because it violated his right to a speedy trial and that the  
19 judgment should be modified to reflect additional custody credit.  
20 Docket No. 18, Ex. M. On May 30, 2013, the appellate court agreed  
21 to modify Petitioner's judgment to reflect the custody credit but  
22 otherwise denied the appeal. Docket No. 18, Ex. P. On August 14,  
23 2013, Petitioner presented his speedy trial claim to the California  
24 Supreme Court, which declined to review the claim. Docket No. 18,  
25 Exs. Q and R.

26 On December 7, 2012, Petitioner filed the instant federal  
27 petition alleging a due process violation related to his prior  
28

conviction allegations.

## II

This Court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") amended § 2254 to impose new restrictions on federal habeas review. A petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Williams (Terry) v. Taylor, 529 U.S. 362, 412-13 (2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that

1 principle to the facts of the prisoner's case." Id. at 413.

2 "[A] federal habeas court may not issue the writ simply  
3 because that court concludes in its independent judgment that the  
4 relevant state-court decision applied clearly established federal  
5 law erroneously or incorrectly. Rather, that application must also  
6 be unreasonable." Id. at 411. A federal habeas court making the  
7 "unreasonable application" inquiry should ask whether the state  
8 court's application of clearly established federal law was  
9 "objectively unreasonable." Id. at 409. Moreover, in conducting  
10 its analysis, the federal court must presume the correctness of the  
11 state court's factual findings, and the petitioner bears the burden  
12 of rebutting that presumption by clear and convincing evidence. 28  
13 U.S.C. § 2254(e)(1). As the Court explained: "[o]n federal habeas  
14 review, AEDPA 'imposes a highly deferential standard for evaluating  
15 state-court rulings' and 'demands that state-court decisions be  
16 given the benefit of the doubt.'" Felkner v. Jackson, 131 S. Ct.  
17 1305, 1307 (2011).

18 When applying these standards, the federal court should  
19 review the "last reasoned decision" by the state courts. Avila v.  
20 Galaza, 297 F.3d 911, 918 n.6 (9th Cir. 2002). In Petitioner's  
21 case, the last reasoned decision addressing the claim in the instant  
22 petition is the California Court of Appeal's August 19, 2011  
23 opinion.

24 With these principles in mind regarding the standard and  
25 scope of review on federal habeas, the Court addresses Petitioner's  
26 claim.

27 //

## III

Petitioner argues that due process requires that the prosecution bear the burden of ensuring that Petitioner has a jury trial on his prior convictions pursuant to Section 1025 of the California Penal Code and that therefore a not-true finding should have been entered in the record with respect to the prior convictions upon the discharge of the jury.<sup>1</sup> Petitioner's claim is a state law claim. His right to a jury trial to prove his prior convictions arises solely from a state statute. Mata, 2011 WL 3652528 at \*13 ("Creswell's right to a trial by jury on the prior conviction allegations is not derived from either the United States Constitution or the California Constitution; rather, it is a purely statutory right granted him under section 1025. People v. Wiley (1995) 9 Cal.4th 580, 589, 38 Cal.Rptr.2d 347, 889 P.2d 541."). Federal habeas relief is unavailable for violations of state law or for alleged error in the interpretation or application of state law, see Swarthout v. Cooke, 131 S. Ct. 859, 861-62 (2011); and Petitioner may not "transform a state-law issue into a federal one merely by asserting a violation of due process." Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996). Habeas relief is denied for this claim.

//

---

<sup>1</sup>In his traverse, Petitioner advances an additional argument. He argues that the court trial on his prior conviction allegations violated the Double Jeopardy Clause by allowing the prosecution a second opportunity to try him on the prior convictions. Docket No. 19 at 4. A petitioner may not raise new claims for habeas relief in a traverse. See Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994).

## IV

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.

Further, a Certificate of Appealability is DENIED. See Rule 11(a) of the Rules Governing Section 2254 Cases. Petitioner has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Nor has Petitioner demonstrated that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not appeal the denial of a Certificate of Appealability in this Court but may seek a certificate from the U.S. Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure. See Rule 11(a) of the Rules Governing Section 2254 Cases.

The Clerk is directed to enter Judgment in favor of Respondent and against Petitioner, terminate any pending motions as moot and close the file.

IT IS SO ORDERED.

DATED 02/17/2015

  
THELTON E. HENDERSON  
United States District Judge

G:\PRO-SE\TEH\HC.12\Creswell 12-6219 deny habeas.wpd